

|                    |                      |
|--------------------|----------------------|
| DOCUMENT           | ELECTRONICALLY FILED |
| DOC #:             |                      |
| DATE FILED: 2/6/19 |                      |

MEMORANDUM ENDORSEMENT

Kathryn Townsend Griffin, Helen McDonald and The Estate of Cherrigale Townsend v. Edward Christopher Sheeran, p/k/a Ed Sheeran, Atlantic Recording Corporation, d/b/a Atlantic Records, Sony/ATV Music Publishing, LLC and Warner Music Group Corporation, d/b/a Asylum Records, 17 Civ. 5221 (LLS)

Defendants' motion for reargument displays two misconceptions.

1.

Defendants seek an order declaring the harmonic progression and the harmonic rhythm in LGO unprotectable as commonplace and in common use prior to LGO, from "undisputed evidence" of their use in about a dozen songs and mentions in guitar method books, out of "millions of songs." Def. Jan. 17, 2019 Br. (Dkt. No. 96) at 15. So abrupt and premature a ruling, on such narrow evidence, might well disfavor the defendants. Even if it had been a score of songs out of only one million, the percentage of uses would be two thousandths of one percent, which the law might consider to be not commonplace, but very rare. It is better to let the evidence on the point develop further.

2.

Defendants suggest certifying to the Court of Appeals, under 28 U.S. Code § 1292(b), the "controlling questions" of protectability of the harmonic progression and rhythm (see above) and whether it is the deposit copy or the sound recording that defines the scope of the copyright. The Court of Appeals denies such applications routinely, preferring (but for a few truly

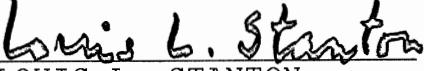
exceptional cases) that such issues be resolved by the district courts in the first instance, and then brought up as part of the whole case on appeal. There is nothing unusual in district courts resolving questions which control the outcomes of cases; it is part of their function. No aspect of the dimensions, difficulties or significance of the issues in this case justifies seeking departure from the usual course of litigation.

\* \* \*

Defendants' motion for reargument or, in the alternative, certification of an interlocutory appeal (Dkt. No. 95) is denied.

So Ordered.

Dated: New York, New York  
February 6, 2019

  
LOUIS L. STANTON  
U.S.D.J.

Donald S. Zakarin  
[dzakarin@pryorcashman.com](mailto:dzakarin@pryorcashman.com)  
Ilene S. Farkas  
[ifarkas@pryorcashman.com](mailto:ifarkas@pryorcashman.com)  
Andrew M. Goldsmith  
[agoldsmith@pryorcashman.com](mailto:agoldsmith@pryorcashman.com)

# MEMO ENDORSED

**PRYOR CASHMAN LLP**

7 Times Square  
New York, New York 10036-6569

*Attorneys for Defendant Edward Christopher Sheeran, Atlantic Recording Corporation and Sony/ATV Music Publishing LLC*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

KATHRYN TOWNSEND GRIFFIN, HELEN  
MCDONALD, and THE ESTATE OF CHERRIGALE  
TOWNSEND,

*Plaintiffs,*

-against-

EDWARD CHRISTOPHER SHEERAN, p/k/a ED  
SHEERAN, ATLANTIC RECORDING  
CORPORATION, d/b/a ATLANTIC RECORDS,  
SONY/ATV MUSIC PUBLISHING, LLC, and  
WARNER MUSIC GROUP CORPORATION, d/b/a  
ASYLUM RECORDS

*Defendants.*

ECF CASE

17-cv-5221 *LLS* ~~(PJS)~~

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE**, that upon the accompanying Memorandum of Law and all prior proceedings had herein, defendants Edward Christopher Sheeran, p/k/a Ed Sheeran, Atlantic Recording Corporation d/b/a Atlantic Records and Sony/ATV Music Publishing LLC (collectively, the "Defendants") shall move this Court, before the Honorable Louis L. Stanton at the Daniel Patrick Moynihan United States Courthouse, Courtroom 21C, 500 Pearl Street, New York, New York, 10007, on a date and time to be determined by the Court, for an Order: (i) pursuant to Local Civil Rule 6.3, granting reargument/reconsideration of the Court's Opinion and Order dated January 3, 2019 (the

MEMO ENDORSED

“Decision”) and, upon granting reargument/reconsideration, declaring the harmonic progression and the harmonic rhythm in LGO unprotectable, commonplace musical building blocks and awarding summary judgment to Defendants; or (ii) in the alternative, in the event the Court does not reconsider the Decision and grant summary judgment to Defendants, pursuant to 28 U.S.C. § 1292(b), certifying an interlocutory appeal to the Court of Appeals for the Second Circuit to determine (a) whether the LGO Deposit Copy defines the scope of copyright protection and (b) whether the determination of protectable elements is, consistent with Second Circuit precedent, a legal question committed to the Court, not the trier of fact.

The reasons and grounds for this motion are more fully described in the accompanying papers.

Oral argument shall be held on a date and at a time designated by the Court.

Dated: New York, New York  
January 17, 2019

PRYOR CASHMAN LLP

By:s/ Donald S. Zakarin  
Donald S. Zakarin  
[dzakarin@pryorcashman.com](mailto:dzakarin@pryorcashman.com)  
Ilene S. Farkas  
[ifarkas@pryorcashman.com](mailto:ifarkas@pryorcashman.com)  
Andrew M. Goldsmith  
[agoldsmith@pryorcashman.com](mailto:agoldsmith@pryorcashman.com)

7 Times Square  
New York, New York 10036-6569  
Telephone: (212) 421-4100  
Facsimile: (212) 326-0806

*Attorneys for Defendants*

TO:

Frank & Rice, P.A.  
325 West Park Avenue  
Tallahassee, Florida 32301  
(850) 629-4168  
*Attorneys for Plaintiffs*